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George Ronald Wright v. Westside Nursery, and Darrel Humphries : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No. 880544-CA
WESTSIDE NURSERY, a Utah limited partnership, and DARREL HUMPHRIES, an individual,	)	Priority No. 14b
Defendants and Respondents.	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, JUDGE PRESIDING

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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

Where a cause is submitted to the jury on special interrogatories, it is the duty of the trial court to apply the law to the findings of the jury and render judgment accordingly. In this case the district court acted properly in concluding that the jury's specific findings regarding Humphries' violation of the management agreement would not support a judgment in damages for wrongful termination of Humphries' employment.

The district court in fact awarded Humphries the interest which Zions Bank had charged against the $30,000 promissory note through the date of trial. Humphries is entitled to no additional interest on that sum nor is he entitled to prejudgment interest on his claim for fraudulent misrepresentation particularly in light of the unliquidated nature of the claim.

Finally, the district court was correct in refusing to declare Wright responsible

for any costs and attorney's fees which may be incurred in the event of any future default occurring in the payment of the Zions Bank note. Even if Humphries were entitled to indemnification, his rights would be limited to the recovery of expenses actually, necessarily, and reasonably incurred. Humphries himself remains responsible for the payment of approximately one-half of the obligation to Zions Bank. It would have been error for the district court to declare Wright responsible for all costs and attorney's fees arising out of any future default without regard to whose breach provides the basis for any future liability.

ARGUMENT

POINT I

THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES WILL NOT SUPPORT A JUDGMENT IN DAMAGES FOR WRONGFUL TERMINATION.

This case was submitted to the jury for determination by special verdict pursuant to the provisions of Rule 49, Utah Rules of Civil Procedure. Humphries erroneously contends that the district court, in refusing to grant Humphries judgment on his claim of wrongful termination, entered judgment notwithstanding the verdict. The district court applied the law to the specific findings made by the jury and declined to enter judgment in accordance with a general conclusion which was inconsistent with specific findings. (Transcript, July 12, 1988, pp.8-12)

Black's Law Dictionary (Revised 4th Edition) defines "special verdict" as follows: "A special finding of the facts of a case by a jury, leaving to the court the application of the law to the facts thus found." On the other hand "[a] 'general verdict' is

one by which the jury pronounces at the same time on the facts and the law, either in favor of the plaintiff or the defendant."

Special interrogatory No. 1 read as follows:

> Did defendant Darrel Humphries breach the agreements between the parties by actions inconsistent with the term of the agreement?

The jury answered this question in the affirmative.

The fact that the jury concluded that these breaches were real and substantial rather than imaginary, hypothetical, or trivial is clearly established by the jury's answers to special interrogatories Nos. 2, 8, 9 and 10.

The foreman of the jury, under questioning by the district court, confirmed that the jury's finding reflected a consensus that Humphries had breached the employment contract by making unauthorized payments from his employer's account. These included: (1) $3,851 in taxes which were in fact Humphries' responsibility; (2) $300 in personal health insurance premiums; (3) $1,254 in interest on the $15,000 note which obligation the jury determined fell upon Humphries under the terms of the written agreement; (4) $900 to Ogden Appraisal; and (5) $500 in attorney's fees incurred in initiating action against his employer. (T. 1146-1147)

In addition to these breaches, Humphries was guilty of literally assaulting his employer in what he, at page 12 of his brief, euphemistically describes as "a 'cloak and dagger' scheme to get copies [of the purchase and management agreements] by wrestling them from Wright as he was leaving the public library."

A fortiori, the entire thrust of the position Humphries took throughout the litigation was inconsistant with and challenged the very basis of the master/servant

relationship.

At page 41 of his brief, Humphries attempts to explain the jury's answer to special interrogatory No. 1 by suggesting that "[t]he jury could have readily concluded that Humphries breached the Purchase Agreement, as compared to the Management Agreement." The error of this argument is readily demonstrated by reference to the jury s specific findings.

Humphries contends that he is entitled to judgment in the amount of $15,000 by reason of the jury's answers to special interrogatory Nos. 3 and 4.

In special interrogatory No. 3 the jury was asked:

> Did Plaintiff George Ronald Wright breach the agreements between the parties by terminating Defendant Darrel Humphries as an employee under the Management Agreement?

The jury answered this question in the affirmative.

Special interrogatory No. 4 asked:

> If your answer to No. 3 is Yes, what damages should be awarded to Defendant Darrel Humphries as a result of the breach?

The jury answered: $15,000.00.

The employer who engages one for a specific period may nevertheless discharge his employee for a breach of some express or implied provision of the contract of service. Such a breach occurs "when the servant does something inconsistent with the relation of master and servant or incompatible with the due and faithful performance of his duties." See 53 Am.Jur.2d, Master and Servant, Section 49 (1970).

As a general rule, specific findings control over general or ambiguous findings. See generally Compton v. Polonski, Tex. Civ. App., 567 S.W.2d 835 (1978).

The answers to specific interrogatories Nos. 1, 2, 8, 9 and 10 cannot, under the facts of this case, be reconciled with a general conclusion finding liability for wrongful termination. Accordingly, judgment was appropriately entered upon the specific findings rather than a general conclusion which purports to apply the law to the facts. Compare Rule 49(b), Utah Rules of Civil Procedure.

In the district court's own words:

> You know, once the jury finds that the employee in possession of the nursery had misappropriated funds and had taken money out of the checking account that he wasn't entitled to do, then I don't think they can find that the employer had no right to terminate him.

Transcript, July 12, 1988, p.11.

As a final note, whether or not an employer is justified in terminating an employment contract is not a pure question of fact but involves the application of legal principles to the facts of the case. By way of comparison see Milligan v. Capitol Furniture Company, 8 Utah 2d 383, 335 P.2d 619 (1959). In that case the issues of negligence, contributory negligence, and proximate cause were submitted to the jury for determination by special verdict. The jury found that the defendants had been negligent in allowing water from a down spout to run onto the sidewalk and form ice. The jury then concluded the plantiff was negligent in walking across the ice where he fell but also concluded that such negligence was not the proximate cause of his fall. The trial court, applying the law to the facts of the case, entered judgment for the defendant, no cause of action. In affirming the trial court, the Utah Supreme Court observed:

> The determination of proximate cause is not a pure fact question, it is largly a conclusion available from the facts adduced.
>
> Proximate cause when the case is submitted under a general verdict is for the jury. In the instant case we are of the opinion that the question of proximate cause of plaintiff's injury affords but one

> answer. His injury was the natural and probable consequence of his own negligence, and only one inference or deduction is permissible, hence the question of proximate cause is one of law.

8 Utah 2d at 387.

In the instant case, not only does the evidence afford but one conclusion regarding justification for Humphries' termination, the jury's specific findings regarding his breaches of the management contract are inconsistent with any other result.

POINT II

HUMPHRIES IS NOT ENTITLED TO ADDITIONAL PREJUDGMENT INTEREST.

In his brief, Humphries contends:

> The court, post-trial, awarded Wright prejudgment interest on $13,577.00, but refused to award Humphries prejudgment interest on $20,198.21 Wright was ordered to pay after offsets, and likewise refused to grant prejudgment interest on damages awarded by reason of the fraud committed by Wright.

Brief of Respondent and Cross-Appellant, p.17.

A

HUMPHRIES WAS IN FACT AWARDED PREJUDGMENT INTEREST ON THE $30,000 PROMISSORY NOTE AT ZIONS BANK.

The Judgment on the Verdict clearly states:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Humphries shall have and recover against Plaintiff Judgment in the amount of $20,198.21 computed as follows:

> A. Plaintiff is entitled to Judgment in the amount of $37,305.21 as reimbursement for funds borrowed from Zions First National Bank and deposited directly into the Westside Nursery checking account. Against this sum, Plaintiff is entitled to setoffs in the amount of $6,805.00 as reimbursement for

> monies misappropriated by Defendant Humphries from the Westside Nursery account for the payment of personal obligations and $6,772.00 as reimbursement for funds withdrawn from the Westside Nursery account after October 4th, 1985, for the purpose of paying accounts which should have been assumed and discharged by Defendants. The amounts specified herein constituting Plaintiff's right of setoff also include interest which has been calculated at the legal rate on the above-mentioned items from the date of the misappropriation or expenditure.

(R. vol.IV, pp.245-246)

On December 13, 1985, Humphries drew $15,000 against the $30,000 note at Zions Bank. On December 30, he drew an additional $5,000 against the note and on January 8, 1986, he took another $10,000 draw. (T. 991-992)

At the time of trial, the unpaid interest on the note was $7,305.21, bringing the total note obligation to $37,305.21. Humphries was granted judgment in that amount less setoffs awarded Wright. These setoffs included prejudgment interest at 10 percent per annum. Prejudgment interest on the note was calculated by Zions Bank at the rate specified in the note.

The fact that Humphries clearly understood that the sum of $37,305.21 included the interest charged by the bank through the date of trial is evident from his counsel's statement at pages 3 and 4 of the July 12, 1988, transcript.

Humphries would have this Court award Humphries prejudgment interest on top of the $37,305.21 which includes the interest charged by the bank. Clearly such result would be unfair and unsupported by applicable principals of law.

B

HUMPHRIES IS NOT ENTITLED TO PREJUDGMENT INTEREST ON HIS FRAUD CLAIM.

The jury was asked to determine what amount of money would be necessary to compensate Humphries for the alleged fraud perpetrated against him. There were no instructions specifically given regarding awarding or denying interest from the date of the transaction.

After the jury had reached its decision, Humphries asked the district court to add interest to the damages assessed by the jury. The district court declined stating:

> What I intend to do is issue--is award interest at 12 percent from the date of judgment. Especially in view of the fact that the jury used a very recent sale of the property to determine the fair market value, and there was considerable dispute in the evidence about what the value was at any given time. It would be extremely difficult to go back and award interest based on some unspecified figure from the past.
>
> So what I intend to do, and I'd like you to include in language to the effect that the amount of the judgment relating to the fraud will bear interest from the date of judgment forward at 12 percent. [Emphasis added]

Transcript, July 12, 1988, p.16.

On appeal, Humphries contends that a claim for fraud is in effect a liquidated claim which may be fixed as to the particular time and the loss measured by facts and figures. While counsel concedes that several jurisdictions approve the award of prejudgment interest in fraud cases, counsel is aware of no Utah case directly on point.

Many jurisdictions hold that where the damages arising out of fraudulent misrepresentation are unliquidated and subject to dispute, prejudgment interest is not

properly awarded. See for example, Younis v. Hart, 138 P.2d 323 (Cal.App. 1943).

The supreme court of our sister state of Colorado has consistently held that prejudgment interest simply may not be recovered in an action for fraud and deceit. See Holland Furnace Company v. Robson, 402 P.2d 628 (Colo. 1965) and cases cited therein.

Because the district court found the evidence regarding the value of the subject property to be unsatisfactory, he refused to do, post-trial, what the jury had not done by its verdict. The facts of this case, particularly the evidence regarding the value of the subject property, clearly indicate that prejudgment interest was properly denied.

POINT III

HUMPHRIES IS NOT ENTITLED TO JUDGMENT FOR COSTS AND EXPENSES WHICH HAVE NOT BEEN INCURRED.

Humphries contends that the judgment for indemnification on the $30,000 note should include a provision awarding Humphries "any costs and attorney's fees Humphries may be required to pay" in the future and that the district court erred in denying such relief. (Brief of Respondent and Cross-Appellant, p.45)

Even if Humphries is entitled to indemnification, it does not follow that he is entitled to a judgment ordering Wright "to pay attorney's fees and other costs required in said promissory note in the event of a default."

The indemnitee's right to recover costs is limited to those expenses actually, necessarily, and reasonably incurred. See generally Restatement, Restitution, Sections 76 through 80.

Wright was held responsible for only about one-half of the $37,305.21 balance owing on the subject note at the time of the trial. He deposited a $75,000 cash

supersedeous bond with the clerk of the district court after taking this appeal.

Even if this Court rules that Wright is required to pay the portion of the note obligation imposed upon him as a part of the district court's judgment, a substantial part of the obligation will remain outstanding unless Humphries also pays his share of the note.

It would have been error for the district court to order Wright to pay any costs or attorney's fees which Humphries may incur in the event of a future default. Indeed such an order would impose upon Wright the obligation to defend Humphries without regard to the viability of any defense which he may assert or the resonableness of any fees or expenses incurred, and regardless of whose default provides the basis of any future liability. Research has revealed no statutory or case law authorizing such a broad declaration.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the district court acted properly in concluding that the jury's specific findings would not support a judgment in damages for wrongful termination.

The court in fact ordered Wright to pay interest which had accrued prejudgment on that portion of the promissory note for which Wright was held responsible. Humphries is entitled to no additional prejudgment interest on that claim or on his claim for fraudulent misrepresentation.

Finally, the district court was correct in refusing to declare Wright responsible for any costs and attorney's fees which may be incurred as the result of any

future default which may occur in the payment of the promissory note.

DATED this 19 day of April, 1989.

/s/
Gary W. Pendleton
Attorney for Plaintiff and
Appellant

MAILING CERTIFICATE

I do hereby certify that on this 19 day of April, 1989, I did personally mail four (4) true and correct copies of the above and foregoing Reply Brief to Hans Chamberlain at Chamberlain & Higbee, P. O. Box 726, Cedar City, Utah 84720.

/s/
Gary W. Pendleton